United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74 - 1702

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1702

ELENA CLASS, et al.	:	Appeal from the United States District Court for the District of Connecticut
PLAINTIFFS - APPELLEES	:	
VS.	:	
NICHOLAS NORTON, INDIVIDUALLY AND AS COMMISSIONER OF WELFARE, STATE OF CONNECTICUT	:	The Honorable M. Joseph Blumenfeld, District Judge
DEFENDANT - APPELLANT	:	

BRIEF OF PLAINTIFFS - APPELLEES

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

MISCELLANEOUS:

ISSUES PRESENTED

1. Whether this Court lacks jurisdiction to consider an appeal from provision of ruling on a motion for contempt which did not order any relief beyond compliance with the District Court's original orders.

2. Whether the decision in Edelman v. Jordan should be applied retroactively to reverse relief originally ordered over two years ago and now finally executed.

3. Whether the decision in Edelman v. Jordan bars the District Court's award of costs and attorneys' fees incident to an order granting prospective injunctive relief.

4. Whether the award of costs and attorneys fees incurred in the proceedings necessitated by the commissioner's refusal to implement the outstanding orders of the District Court was a proper exercise of the court's inherent equitable power.

STATEMENT OF THE CASE

Nature of the Case

On January 4, 1974, plaintiffs-appellees, applicants and recipients of Aid to Families with Dependent Children (hereafter "AFDC"), filed a Motion for Contempt and Other Relief (R. 14, Motion) (a copy of which is attached hereto as supplement "A")[1] against defendant-appellant Nicholas Norton, Commissioner of Welfare of the State of Connecticut (hereafter "Commissioner"), in the United States District Court for the District of Connecticut alleging violations of the final orders the District Court had entered in this case in June, 1972. (R. 9, Decision; R. 10, Addendum to Decision; R.11, Judgment). Specifically, plaintiffs claimed that the Commissioner had not obeyed the Court's order of June 16, 1972, (R. 9, Decision) requiring him to comply with applicable federal regulations by determining the eligibility of an applicant for AFDC benefits within 30 days from the date of application for assistance. Plaintiffs also alleged that the Commissioner had failed to implement the Court's complementary order (R. 9, Decision) that if, through no fault of the applicant, a determination of eligibility was not made within

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[1] The Motion does not appear in the Appendix because counsel for the defendant-appellant refused to include it. Plaintiffs-appellees have moved for leave to file a supplemental Appendix including the motion, but attach it hereto for the convenience of the Court.

30 days, the Commissioner must presume the applicant eligible for assistance and mail an assistance check accordingly.

Plaintiffs further claimed that the Commissioner had vitiated the effect of the Court's decree that assistance be effective from the date of application for assistance, regardless of the date of determination of eligibility (R. 9, Decision), by promulgating a departmental directive, dated May 4, 1973, which required recipients to demonstrate "unmet need" in order to receive the benefits to which they were entitled and which set an arbitrary limit on the amount of benefits which would be paid. (R. 15(O), Appendix to Motion (Directive). The bi-monthly reports from the Commissioner ordered by the Court (R. 10, Addendum to Decision) on the number of pending AFDC applications, including the number of applications which were pending more than 30 days were alleged to be incomplete and misleading. (R. 15(D-I), Appendix to Motion (Report). Finally, plaintiffs asserted that the Commissioner had ignored the Court's order to pay AFDC benefits from the date of application to all recipients whose applications were approved since the filing of the lawsuit to the extent that emergency Town Welfare benefits received by the recipients were less than the AFDC benefits to which they were entitled. (R. 10, Addendum to Decision; R. 11, Judgment).

In their prayer for relief, plaintiffs asked that because of these violations the Commissioner be adjudged in contempt of Court. (R. 14, Motion). They also moved that the Court, in addition

to requiring the Commissioner to purge himself by complying with its previous orders, impose the penalty for non-compliance provided for in previous orders of the Court (R. 11, Judgment), the withdrawal of federal funds for use in the AFDC Program in Connecticut. Plaintiffs lastly requested that the Commissioner be required to pay the reasonable costs and attorneys' fees incurred by the necessity to prosecute his contemptuous conduct. (R. 14, Motion).

Hearing Below

A hearing was held on plaintiffs' Motion for Contempt and other Relief on January 10, 1974 (R. 1 and 2, Transcript). The Commissioner admitted non-compliance with the Court's orders. (Tr. at 61, l. 24 to 62, l. 24). This non-compliance was evidenced by his own statistical reports on the number of applications which were not processed within the 30-day time limit, averaging over 18 per cent. (R. 15 (D-I), Appendix to Motion (Reports). R. 18, Ruling, at 3). Several categories of reasons for failure to process on time were shown to be impermissible excuses under Federal law. (Tr. at 48, l. 15 to 49, l. 10).

The director of one of the district offices testified that since the reports to the Court had ceased in June, 1973, the degree of non-compliance with the 30 day time limit for processing applications had increased and now averaged over 35 per cent. (Tr. at 72, l. 1 to 73, l. 1; Tr. at 75, l. 7 to 76, l. 10 R. Second S. 3-7, Records). Under questioning by his own counsel,

the official admitted that his office was not "the worst" with respect to processing applications, i.e. that other district offices in the state had a greater percentage of cases that were not processed in time. (Tr. at 82, l. 3-11). The time taken to process the AFDC applications made in that office of persons receiving emergency town assistance benefits in the interim , benefits "substantially less" than the AFDC benefits to which they were entitled (Tr. at 63, l. 1-3; Tr. at 92, l. 11-19), averaged 51 days. (Tr. at 89, l. 24 to 90, l. 10; R. Second S. 8-18, Records).

Nevertheless, the Commissioner's agent testified that between two and ten per cent of recipients had to demonstrate "unmet need" or the amount of their AFDC benefits, from which emergency town assistance payments had already been deducted, would be further reduced (Tr. at 36, l. 3 to 37, l. 10; Tr. at 59, l. 6-10). The Commissioner admitted that the directive issued by his assistant providing for such a policy was "clearly in violation of the Court order" if it so burdened an applicant. (Tr. at 31, l. 10-14).

Concerning the benefits owing to recipients for the period December, 1971, to June, 1972, which had never been paid, the Commissioner's agent testified that the task of identifying those eligible for payment would be much more difficult than it would have been when the order was rendered, due to the fact that the necessary records had been destroyed. (Tr. at 8, l. 20 to 9, l. 1; Tr. at 42, l. 19 to 43, l. 20).

Disposition Below

Following the hearing and consideration of plaintiffs' affidavits (R. 15 (J-N), Appendix to Motion (Affidavits); R. 17, Supplemental Affidavits), the Court on March 22, 1974, issued a Ruling on plaintiffs' Motion for Contempt and Other Relief. (R. 18, Ruling). Judge Blumenfeld found that each of plaintiffs' allegations was sustained by the record evidence and that "non-compliance has been substantial and wide-spread" (R. 18, Ruling). He noted that the defendants "did not dispute this conclusion" but offered lack of administrative personnel and miscomprehension of the Court's previous orders as excuses.

The Court reiterated its original holding that "lax administration provides no justification..." for failure to comply. The Court reemphasized that the 30 day period for "processing" applications is to be measured from the date of application to the date the first assistance check (or notification of denial of assistance) is mailed to the applicant and not from the time of application to the time of its approval by a supervisor, as was defendant's practice (R. 17, Plaintiffs' Affidavits (Affidavit of Attorney Marilyn Katz). Moreover, the Court found these violations of prior orders had been "exacerbated" by the promulgation of departmental directives[2] placing the burden upon eligible

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[2] A second directive dated December 4, 1973, "clarifying" the original one was presented by defendant at the hearing on plaintiffs' Motion for Contempt, but does not appear in the Record.

recipients to show "unmet need" and imposing an arbitrary limit on the amount of benefits which would be paid, in direct violation of the Court's decree that full assistance be paid from the date of application (less any emergency Town Welfare benefits received).

Nevertheless, the Court declined to grant plaintiffs the remedies they sought--citation of the defendant Commissioner for contempt and issuance of an injunction preventing the use of federal funds for the AFDC program in Connecticut--and confined its Ruling to requiring the Commissioner to "properly implement the prior orders of [the] Court." (R. 18, Ruling). The benefits still owing recipients from the date of the filing of the lawsuit had to be paid. (R. 18, Ruling, at 11-12, paras. (1) and (2). The previous orders of the Court requiring determination of eligibility within 30 days, presumptive eligibility after 30 days, and assistance from the date of application were ordered to be drafted as departmental regulations using the Court's language and distributed to all Welfare Department personnel, (R. 18, Ruling, at 13, paras. (3)(a) and (b). The departmental directives of May 1, 1973, and December 4, 1973, were ordered rescinded in so far as they placed a burden upon a recipient to demonstrate "unmet need" in order to receive his or her benefits or imposed a specific dollar limitation on the amount of such payments. (R. 18, Ruling at 13, para. (3)(c). In addition, the compliance reports of the Commissioner were required to be continued. Finding that the value of the time

"necessarily expended" by the attorneys for the plaintiffs to protect the rights of their clients"in the face of unjustified non-compliance with this Court's prior orders on the part of the defendant" was "in excess of $1,000," the Court ordered the defendant," as Commissioner and in his individual capacity, to pay costs and attorneys' fees" in that amount. (R. 18, Ruling, at 15).

On April 3, 1974, the Commissioner filed his notice of appeal from the Ruling of March 22, 1974. (R. 19, Notice). He also applied to the District Court for a "partial" stay order of all the rulings on the contempt motion except the monthly reporting requirement. After granting the Commissioner two enlargements of time within which to pay attorneys' fees and costs, the District Court on May 13, 1974, denied defendant's application for a stay.[3]

Court of Appeals Proceedings

Subsequent to the District Court's denial of a stay, the Commissioner moved this Court for supersedeas on May 15, 1974. At a hearing on May 21, 1974, this Court (per Smith, C.J., Timbers, C.J.,and Tyler, D.J.) refused to grant the Commissioner a stay of relief pending determination of the appeal.

On May 28, 1974, plaintiffs' Motion to Dismiss the appeal for lack of jurisdiction was denied without prejudice to renewal

[3]At the same time, the Court denied defendant's pending motion for relief from judgment with respect to determining eligibility within 30 days and granting assistance effective from the date of application. (R. First S. 2, Denial).

(per Moore, C.J., Feinberg, C.J., and Weinfeld, D.J.). On that date the Court also set the schedule for briefing and argument.

The Commissioner then moved to consolidate this appeal with his appeal from the denial by the District Court of his motion for relief from judgment, Court of Appeals No. 74-1812. Judge Mansfield denied the motion to consolidate the two appeals on June 27, 1974.

ARGUMENT

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to hear an appeal from the provisions of the District Court's Ruling on a Motion for Contempt which ordered no relief beyond compliance with its original orders. The Commissioner did not appeal the original judgment in this case and did not make any motion which would terminate the running of the time period within which to appeal. In a contempt proceeding, a defendant cannot attack the underlying judgment from which he failed to appeal, nor can he challenge the merits of the judgment on appeal. The defendant is limited to challenging the finding of contempt itself and the sanctions imposed.

In the instant case, the District Court in its Ruling of March 22, 1974, though finding the Commissioner in "substantial and widespread non-compliance," issued no contempt citation and declined to grant plaintiffs' request for an injunction prohibiting the use of federal funds in Connecticut's AFDC program. The Court required only that the Commissioner properly implement its prior orders. To reorder the same relief does not constitute a new final judgment from which an appeal can be taken. The appeal from all parts of the Ruling which merely require obedience to the original orders of the Court should therefore be dismissed.

Assuming arguendo that these provisions of the Ruling do constitute an appealable order, the decision in Edelman v. Jordan, ___U.S.___, 39 L. Ed. 2d 662 (1974) should not be applied retroactively to reverse relief originally ordered over two years ago and now substantially completed. The question of whether the decision, that the Eleventh Amendment permits federal courts to order the payment of benefits by state officials only when incident to prospective injunctive relief, should be applied retroactively was not addressed by the Court in Edelman. Under the established test for non-retroactivity, however, the Edelman opinion should not be applied to alter the results in this case.

As the first opportunity the Court took to fully explore and treat the Eleventh Amendment aspects of court-ordered payments of benefits wrongfully withheld, Edelman decided an issue whose resolution was not clearly foreshadowed. Indeed, the Court noted cases of precedential value to the contrary and found it necessary to specifically disapprove those prior cases. This establishment of a new principle of law is one of three criteria requiring non-retroactive operation of the decision.

Because the relief has been all but completely executed, retrospective application would not further the purpose and effect of the rule in Edelman. Retroactive operation would cause great injustice and hardship to plaintiffs, needy recipients who were entitled to such benefits. As the avoidance of such inequity is a primary reason for a holding of non-retroactivity, Edelman should not be applied to undo what was so belatedly accomplished.

The decision in Edelman also does not bar the award of costs and attorneys' fees against the Commissioner in this case. The inherent equitable power of a federal court to make such an award was affirmed by the Edelman holding that payments by state officials may be ordered when incident to prospective injunctive relief. The payment of costs and attorneys' fees provided for in the Ruling of March 22nd was incident to the entry of prospective injunctive relief at that time and therefore permissible under Edelman. Moreover, because the award was for assistance in enforcing prior valid court orders, it clearly has only the ancillary effect upon the Commissioner permitted under Edelman.

The fact that the costs and fees awarded were incurred in a proceeding necessitated by the Commissioner's "unjustified failure to comply" with the orders of the District Court entered in June, 1972, also supports the Court's exercise of its equitable discretion against him. In addition to sanctioning the Commissioner, the award furthers the public interest by encouraging the enforcement of important constitutional and statutory rights. The record further demonstrates that the award against the Commissioner in both his official and individual capacities was proper and within the sound discretion of the district court.

I. THE PROVISIONS OF THE DISTRICT COURT'S RULING THAT THE COMMISSIONER COMPLY WITH ITS PREVIOUS ORDERS ARE NOT APPEALABLE.

Under the Federal Rules of Appellate Procedure, an appeal must be taken in a civil case within 30 days from the date of the entry of the judgment appealed from. Rule 4(a), F.R.App.P. This is a jurisdictional requirement, and the Court of Appeals has no power to consider an appeal which is not filed within the requisite time period. Albers v. Gant, 435 F. 2d 146, 148 (5th Cir. 1970). In the instant case, defendant never appealed or attempted to appeal from the judgment of the District Court entered on June 29, 1972, (R. 11, Judgment) nor made any timely motion which would terminate the running of the time period prescribed to take an appeal. That time period has since clearly expired.

The Commissioner did file a timely notice of appeal from the Ruling of the District Court on plaintiffs' Motion for Contempt and Other Relief. But it is well settled that "a party cannot appeal from a post-judgment sentence for civil contempt and attack on that appeal the underlying judgment from which he has failed to appeal." 9 J. Moore, Federal Practices Sec. 110.13 [4], at 168-169 (2d ed. 1972). He is limited to challenging the basis of the finding of contempt and the sanctions ordered. United States v. Mine Workers, 330 U.S. 258, 302-307 (1974).

However, in the instant case, there was no finding of contempt. The Court did not hold the Commissioner in contempt as plaintiffs requested. It also declined at that time to order

other relief plaintiffs sought prohibiting the use of federal funds for the AFDC program in Connecticut. No further sanctions were imposed on the Commissioner. Judge Blumenfeld merely ruled that the Commissioner must do what he had ordered him to do almost two years previously. As this Court held in United States v. Secor, 476 F. 2d 766, 770 (2d Cir. 1973), defendant "cannot now turn back the hands of the clock" and ask the appellate court to consider the merits of a final order from which no appeal was taken.

In Secor, supra, the defendant was sentenced to jail for his non-compliance with a court order to produce records for the Internal Revenue Service. Although the defendant sought to raise on appeal from the contempt order a fundamental constitutional right against self-incrimination, this Court refused to consider his claim on the merits, holding that to "permit such a collateral attack would be to make a mockery of the well-settled doctrine "[of res judicata]." Secor, supra, at 770, citing Oriel v. Russell, 278 U.S. 358 (1929).

This compelling policy, that litigation should at some point come to an end, is joined in the contempt situation by the necessity to maintain respect for judicial orders. This is why both Oriel, supra, and Maggio v. Zeitz, 333 U.S. 56 (1948), also cited by the Secor court, hold that a contempt proceeding does not permit reconsideration of the legal of factual bases of the order alleged to have been disobeyed: "Disobedience cannot be justified

by retrying the issues as to whether the order should have issued in the first place." Maggio, supra, at 69. See also, N.L.R.B. vs. Local 282, International Bro. of Teamsters, Etc., 428 F. 2d 994 (2d. Cir. 1970), where this Court, in holding a defendant foreclosed from raising in a contempt proceeding necessitated by violations of a permanent injunction, issues which could have been raised originally, noted that very little case law existed in this area for "the simple reason" that defendants ordinarily do not violate injunctions without bothering to appeal. N.L.R.B., supra, at 999, citing Note, Developments in the Law-Injunctions, 78 Harv. L. Rev. 994, 1080 (1965).

Therefore, on appeal from a post-final judgement ruling on contempt, the Court's inquiry is limited to whether there was a basis for the District Court's finding of contempt and its order for sanctions. Here, the rulings of the Court were designed merely "to properly implement the prior orders of [the] Court." (R. 18, Ruling, at 10).

Testimony from his own agents established that the Commissioner had never paid the benefits ordered by the District Court from the date of the filing of the lawsuit, this figure being attributed to a lack of personnel. (R. 18, Ruling, at 4). The Commissioner's employees also testified that because certain records had been destroyed, it would require more effort to identify those eligible for payments. (Tr. at 8, l. 20 to 9, l. 2; Tr. at 42, l. 29 to 43, l. 20). Accordingly, in paragraphs (1) and (2) of its Ruling, the Court required the Commissioner to assign additional workers to reveiw department records in order to determine which recipients,

former and present, were currently eligible for these benefits and to provide for the payment of such benefits. The defendant was additionally ordered to submit monthly reports on his progress in this belated compliance.

Judge Blumenfeld found that another factor contributing to the inaffective implementation of his Orders was a "misunderstanding of the requirements of the Orders on the part of Welfare Department personnel." (R. 18, Ruling, at 5). Therefore, he required the Commissioner to issue department policy specifying that determinations of eligibility must be made in time for checks to be mailed within 30 days. (R. 18, Ruling at 13, para. (3)(a). The District Court also required the Commissioner to state in directive form the policies of presumptive eligibility and assistance from the date of application (less the amount of any emergency town assistance benefits paid) as ordered in the Judgment of June, 1972 (R. 18, Ruling at 13, para. (3)(b).

After lengthly discussion of the extent to which this misunderstanding of his prior orders had been "exacerbated" by the promulgation of two Welfare Department directives placing a burden upon recipients to demonstrate "unmet need" in order to receive their benefits from the date of application and imposing a specific dollar limitation on the amount of such payments from the day of application, Judge Blumenfeld found these directives "violative of the Court's prior orders." (R. 18, Ruling at 8). See, Woolfolk v. Brown, 358 F. Supp. 524, 534-35 (E.D. Va., 1973).

The Commissioner was therefore required to rescind these non-conforming directives. (R. 18, Ruling at 13, para. (3)(c). The submission of further reports was required to enable the Court and plaintiffs' counsel to judge the Commissioner's progress in acheiving compliance with its previous orders. These provisions which merely implement the prior orders of the Court constitute the total substance of the Ruling[4], except for the award of costs and attorneys' fees. (Discussed, infra, at Section III).

The fact that the Court showed restraint in declining to hold the defendant in contempt and attempted only to have its original final orders enforced cannot itself become the basis

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[4]The District Court subsequently had occasion to confirm the status of the provisions of the March 22nd Ruling as an attempt to enforce its prior orders. In rejecting the Commissioner's application for a stay of its Ruling pending appeal to this Court, the District Court had occasion to consider the defendant's probability of success on the merits. Judge Blumenfeld found the grounds advanced by the Commissioner insubstantial, including the assumption that the Court of Appeals would address the merits of defendant's claim, and stated:

> Moreover, the Order of March 22, 1974, was in a ruling on a Motion for Contempt and Other Relief. This Court did not hold the defendant Commissioner in contempt, but instead supplemented its earlier orders in order to more effectively protect the rights of the plaintiffs. It is extrememly unlikely that the defendant could attack the merits of the Orders of June 16 and June 22, 1972, by appealing the Order of March 22, 1974. The March 22, 1974, ruling was based not on the merits of the prior orders but on the failure of the defendants to comply with those orders.
>
> Ruling on Defendant Norton's Motion for Relief from Judgment and Application for Partial Stay Order, (R.First S 2, Denial, at 10, n.3).

of defendant's argument that he is entitled to this appeal. Because a judgment previously entered has been re-entered does not extend the time within which review must be sought from the judgment. F.T.C. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952).

In the F.T.C. case, the Court of Appeals had entered a judgment reversing one of three parts of a cease-and-desist order of the F.T.C. Later it entered another judgment sustaining its reversal of that part and decreeing enforcement of the other two parts. The Supreme Court denied the F.T.C.'s petition for certiorari after the second judgment, finding that the first judgment was for all purposes final, and not "tentative, informal, or incomplete." F.T.C., supra, at 213.

The test the Court used in deciding that it was without jurisdiction to consider the merits of the appeal was a practical one:

> The question is whether the lower Court in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.
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> F.T.C., supra, at 212.

The Court noted that the statutes which limit jurisdiction to cases where review was sought within the prescribed time period served the general principle that "litigation must at some definite point be brought to an end." Id., at 213; see also, Department of Banking v. Pink, 317 U.S. 264 (1942). This Court,

citing F.T.C. and Pink, has also ruled that "the mere fact that a judgment previously entered has been re-entered or revised in a immaterial way does not toll the time within which review must be sought." Leiberman v. Gulf Oil Corp. 315 F. 2d. 403, 404 (2d Cir., 1963), cert. denied, 375 U.S. 823 (1963).

The provisions of the District Court's Ruling in the instant case meet the test enunciated by both the Supreme Court and this Circuit. All questions litigated in the original action were put to rest by the extensive Memorandum of Decision, Addendum, and Final Judgment of June, 1972. There was nothing "tentative, informal or incomplete" about these orders. And as in N.L.R.B. v. Local 282, supra, the Commissioner had several alternatives to accepting the final injunctive relief ordered by the Court, including an appeal.

The Commissioner, however, did not appeal. Rather, he chose to disobey the District Court's orders for over a year and a half. For this disobedience, the Commissioner was not penalized, but merely required to finally implement the orders. He now seeks to take advantage of this leniency by asking this Court to permanently excuse him from compliance.[5] The interests of

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[5]The fact the Commissioner cites Edelman v. Jordan, __U.S.__, 39 L. Ed. 2d 662 (1974), reh. denied, __U.S.__, 40 L.Ed.2d 777 (1974), in support of this appeal does not improve his position since he was in no way precluded from raising the Eleventh Amendment issue prior to that decision as the defendant did in Rothstein v. Wyman, 467 F.2d 226 (2d Cir.1972), cert. denied, 411 U.S. 921(1973), by appealing the judgment against him within 30 days. C.f. Campagnuolo v. White, Civ. No.13,968 (D.Conn., Jan. 16, 1973), where the same defendant under a similar court order argued to the same judge that the Eleventh Amendment holding in Rothstein, supra, required the Court to alter its judgment. The District Court rejected this contention and the Commissioner did not appeal the adverse ruling.

respect for outstanding court orders and of the avoidance of repetitious litigation demand that this untimely appeal from the provisions of the Ruling which provided no relief beyond compliance with the District Court's original final orders be dismissed.

II. THE DECISION IN EDELMAN V. JORDAN SHOULD NOT BE APPLIED RETROACTIVELY TO REVERSE RELIEF ORDERED OVER TWO YEARS AGO AND NOW FINALLY EXECUTED.

If the portions of the Ruling of March 22nd requiring the Commissioner to implement the prior orders of the District Court are considered appealable, the Commissioner claims they must be reversed solely on the basis of the recent decision in Edelman v. Jordan, ___U.S.___, 39 L.Ed. 2d 662 (March 25, 1974), reh. denied, ___U.S.___, 40 L.Ed. 777 (1974). The relief ordered in those portions of the Ruling, however, is not the type proscribed by the holding in Edelman. Even if it were, to reverse the relief at this time would require the retrospective application of the decision in Edelman because the Ruling in Class predates that decision by three days. Application of the prevailing doctrine of non-retroactivity in civil cases demonstrates that Edelman should not be invoked to invalidate relief originally ordered over two years ago and now finally executed.

In Edelman, the Supreme Court held in a 5-4 decision that the Eleventh Amendment permits federal courts to order the payment of welfare benefits by a state official only when such payment is incident to prospective injunctive relief. Plaintiff had brought an action for declaratory and injunctive relief against the Illinois officials administering the federal-state Aid to the Aged, Blind and Disabled (AABD) programs, claiming that they were violating federal law and the Equal Protection Clause by following state regulations which did not comply with federal time limits for

processing AABD applications. The district court entered a permanent injunction requiring compliance with the federal time limits and also ordered the state officials to release and remit AABD payments wrongfully withheld from eligible persons who had applied for benefits between July 1, 1968, the date of the federal regulations, and April 16, 1971, the date of the court's preliminary injunction. The Court of Appeals affirmed, holding, inter alia, that the Eleventh Amendment did not bar the restitution of such benefits. Jordan v. Weaver, 467 F. 2d 985 (7th Cir. 1973).

In reversing that part of the lower court's order which required the welfare director to remit benefits prior to the date of the preliminary injunction, the Supreme Court emphasized that impact on the state treasury was not the touchstone of the rule it was announcing. Money paid out by state officials in shaping their conduct to the mandate of prospective court decrees is a necessary result of compliance, according to the Court. Such an "ancillary effect" is "permissible and often inevitable." 39 L.Ed. 2d, at 675. The Edelman situation was distinguishable because the defendants had been under "no court-imposed obligation" to conform their conduct to a particular standard at that time the payment of funds was ordered. 39 L.Ed. 2d at, 675-76.

The instant suit was filed on December 6, 1971. The original orders of the Court were entered on June 16, June 22, and June 29, 1972. The only provisions of the orders of June , 1972, required to be complied with by the Ruling of March 22, 1974, to which

Edelman "could conceivably be applicable," are those requiring payment of benefits to recipients whose applications were approved subsequent to the date the suit was filed but prior to the date of the District Court's June orders. (R. 18, Ruling, at 11-12, paras. (1) and (2); R. First S. 2, Denial, at 8, n. 1). The provisions of the Ruling implementing other parts of the orders by requiring the issuance of regulations governing the time limits for processing applications, presumptive eligibility, and assistance effective from the date of application; by rescinding the intervening departmental directives; and by requiring continued compliance reports, do not involve the payment of benefits prior to the date prospective injunctive relief was entered in this case.

Even the benefits for the six-month period prior to June, 1972, are distinguishable from those at issue in Edelman. For unlike the defendant in Edelman, the Commissioner herein was already under a "court-imposed obligation" to release the benefits at the time the March 22nd Ruling was entered again mandating their payment. The benefits were thereby transformed from their prior status as payments not incident to prospective injunctive relief into an "ancillary effect" of correcting the defendants disobedience of unchallenged court orders. Under the rule in Edelman these payments must be categorized as "permissible" and even "inevitable" results of complying with a court decree.

If the benefits ordered to be paid recipients between December, 1971, and June, 1972, are found to be counterparts of the payments

precluded in Edelman, the issue is whether the Eleventh Amendment holding announced in Edelman should be applied retrospectively to bar them. In Edelman, the Supreme Court gave no guidance on the resolution of this issue. The Court spoke of retrospective application only in the context of an alternative ground the welfare director presented for disallowing the payments. The state official contended that the decision of the District Court in Edelman holding the federal time requirement were "law" should not have been applied retrospectively to Edelman itself to mandate the payment of all benefits from July, 1968, forward. 39 L.Ed. 2d at 670, n. 7. It was in light of the Court's disposition of Edelman on Eleventh Amendment grounds that there was "no reason to address this contention." Id. However, the doctrine of non-retroactivity elsewhere enunciated by the Supreme Court dictates that Edelman should not be applied to require the return of the benefits ordered and finally paid in the instant case. Chevron Oil Co. v. Huson, 404 U.S. 97(1971); Lemon v. Kurtzman, 411 U.S. 192 (1973).

In Chevron the plaintiff brought suit under the Lands Act, 43 U.S.C. §1331 et seq., to recover for personal injuries sustained by him while employed on the defendant's artificial island drilling rig off the Louisiana coast. At the time the lawsuit was filed, precedent interpreted the Act to make general admiralty law, including the equitable doctrine of laches, applicable. But prior to trial the Supreme Court decided Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), holding state law, not admiralty doctrine, should be applied under the Lands Act.

Relying on the new Supreme Court decision, the lower court held that the Louisiana one year statute of limitations governed rather than the admiralty law which would have permitted the action and dismissed the case. The Supreme Court agreed with the lower court that the state statute of limitations governs in Lands Act cases under Rodrigue , but held that the Rodrigue decision should not be invoked to require application of the time bar retrospectively to the Chevron case.

Three factors were considered by the Court in determining whether the decision should be applied non-retroactively:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied,..., or by deciding an issue of first impression whose resolution was not clearly foreshadowed, .. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question,its purpose and effect, and whether retrospective operation will further or retard its operation."... Finally, we have weighed the inequity imposed by retroactive application, for "(w)here a decision by this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice of hardship' by a holding of non-retroactivity."...
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> 404 U.S., at 106-07 (citations omitted).

Addressing the first factor, the Court held Rodrigue to be a case "of first impression" in the Court. Chevron, supra, at 107. Moreover, the Court found the decision "effectively overruled" a line of court of appeals cases on the issue. Noting that a primary purpose of the rule established in Rodrigue was

to help injured employees by affording them comprehensive and familiar remedies, the Court reasoned that this purpose would not be furthered by applying the rule retrospectively to deprive the plaintiff in Chevron of any forum to obtain a remedy. The Court concluded that allowing such a deprivation would not serve the ends of equity, the third and final factor to be considered. Chevron, supra, at 108.

The criteria enumerated in Chevron for non-retroactivity are likewise satisfied in the instant case. Like Rodrigue, supra, the decision in Edelman overruled past precedent on which plaintiffs had relied. In Class, the precedents were even more weighty than those involved in Rodrigue, because they were cases handed down by the Supreme Court itself. Three district court judgments requiring state directors of public aid to make the type of payment at issue in Edelman had recently been summarily affirmed by the Supreme Court notwithstanding Eleventh Amendment arguments made by state officials on appeal. State Department of Health and Rehabilitative Services v. Zarate, 407 U.S. 918 (1972), aff'g, 347 F. Supp. 1004 (S.D. Fla., 1971); Sterrett v. Mother's and Children's Right Organization, 409 U.S. 809 (1972), aff'g, unreported order and judgment of N.D. Ind., 1972, on remand from Carpenter v. Sterrett, 405 U.S. 971 (1971); Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y., 1968) (order at CCH Pov. L Rptr. Transfer Binder para. 10,506), aff'd per curiam sub nom., Wyman v. Bowens, 397 U.S. 49 (1969).

In yet another case, the Eleventh Amendment objection to retroactive relief was presented to the Court in a case which was actually argued. Shapiro v. Thompson, 394 U.S. 618 (1968), aff'g, Thompson v. Shapiro, 270 F. Supp. 331, 338 n. 5 (D.Conn., 1967) (per Smith, Blumenfeld, and Clarie). Mr. Justice Rhenquist, speaking for the majority in Edelman stated:

> "Shapiro v. Thompson and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case."

Edelman at 677; id., at 683-84 (Douglas, J., dissenting). The relief mandated by Judge Blumenfeld in his orders of June, 1972, and reordered in his ruling of March 22, 1974, was therefore based on sound judicial precedent.[6]

In deciding Edelman, the majority found it necessary to specifically "disapprove" the Court's prior cases. 39 L.Ed. 2d at 677. The Court held that it was less constrained by the principle of stare decisis in dealing with constitutional questions. Id. The Court also described Edelman as the "first opportunity"it

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[6]In addition to the Supreme Court cases was a formidable body of federal decisions throughout the country which had ordered state officials to make restitution to public aid recipients of benefits wrongfully denied. McDonald v. Dept of Public Welfare, 430 F. 2d 1268 (5th Cir. 1970); Wilson v. Weaver, 358 F. Supp. 1147, 1152 (N.D. Ill. 1973); Alexander v. Weaver, 345 F. Supp. 666 (N.D. Ill. 1972); Schaak v. Schmidt, 344 F. Supp. 99, 104 (E.D. Wis. 1971); Alvarado v. Schmidt, 317 F. Supp. 1027 (W.D. Wis. 1970); Stoddard v. Fisher, 330 F. Supp. 566 (D. Me. 1971); Tripplett v. Cobb, 331 Supp. 652 (N.D. Miss. 1971); Baxter v. Birkins, 331 F. Supp. 222, 226 (D. Colo. 1970); Ojeda v. Hackney, 319 F. Supp. 149 (N.D. Tex. 1970), aff'd, 452 F. 2d 947 (5th Cir. 1972); Brooks v. Yeatman, 311 F. Supp. 364 (M.D. Tenn. 1970); Machado v. Hackney, 299 F. Supp. 644 (W.D. Tex. 1969).

had taken to "fully explore and treat the Eleventh Amendment aspects of [retroactive] relief in a written opinion." Id. Edelman, like Rodrigue, thus established a new principle of law which similarly should not be invoked to bar recovery in the instant case.

The purpose of the rule announced in Edelman is to protect state officials from being required to pay out money which should have been paid prior to court action, but was not. 39 L.E. 2d at 675-676. The District Court in Edelman had ordered the payment of benefits wrongfully withheld for over three years prior to the entry of the preliminary injunction. The payments of these benefits would require "a very substantial amount of money". 39 L. Ed. 2d at 673. However, the payments were never made, due to the issuance of stays of the provisions relating to restitution. Edelman v. Jordan, 414 U.S. 1301 (1973). Thus, application of the rule announced in Edelman to Edelman itself furthered the purpose of the rule by relieving the state official of the necessity of making the payments.

In Class, however, the judgment has finally been executed.[7] Unlike the payments ordered in Edelman, the benefits here covered only a six-month period after the filing of the lawsuit. In addition, the Court specified that all town welfare payments received by a recipient were to be deducted from the amount of AFDC

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[7]Benefits have been calculated and paid in all but about 125 cases, according to the Commissioner. See, letter of the Commissioner to the Court dated July 17, 1974, a copy of which is attached hereto as Supplement "B".

benefits owed by the State. These supplemental benefits went only to those recipients "currently eligible" to receive them. (R. 18, Ruling at paras. (1) and (2). Given the relatively small amounts of money involved and the current needy status of the recipients, it is unlikely that the Commissioner could recover the payments in any event. Therefore, the purpose of the rule in Edelman would not be served by applying it retroactively to the instant case.

The final criterion used by the Court in Chevron, was whether a retrospective application of the rule would produce a inequitable result. Chevron, supra, at 108. In Class, substantial injustice and hardship would result from retrospective application of Edelman. It would be a serious miscarriage of justice to force needy welfare recipients to repay the benefits due to them for over two years and paid to them so belatedly. Like the injured plaintiff in Chevron, the plaintiffs in Class relied on the law as it then was to protect them.

Moreover, they relied on the public official to obey the law and pay them their benefits as the Court had decreed. Instead, the Commissioner sat back and awaited a more favorable ruling in another case. This Court should not reward behavior that has such serious implications for our system of justice.

In the other leading case on non-retroactivity in civil cases, Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II), the Court decided that an earlier decision on constitutional grounds in

the same case, Lemon v. Kurtzman, 403 U.S. 602 (1971),(Lemon I), would not be applied retroactively to bar the payment of state funds. In Lemon I the Court held that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. In that case plaintiffs abandoned their attempt to enjoin the payment of state funds under the program for the first year, and did not seek to enjoin contracts or payments for the second or third years. Only after the Supreme Court's decision, on remand, did they seek to prevent the reimbursement by the state for services provided by the schools under contracts for the third year prior to the decision in Lemon I.

Under these circumstances, the Court affirmed the decision of the lower court which permitted state payments for services performed prior to the decision in Lemon I, but enjoined any payments under the program for services rendered afterward. Lemon, 411 U.S. 192 (1973). The Court stressed that the broad discretionary power of trial courts in shaping equity decrees extends to cases with constitutional dimensions. The Court relied on the findings of the District Court supporting its order, that to allow the payments would not "substantially undermine the constitutional interests at stake in Lemon I" but to deny them would impose a substantial hardship on the recipients of the payments.

The Commissioner herein, like the plaintiffs in Lemon, did not attempt to halt the payment of state funds through the prompt use of the legal process. Only after the conclusion of the contempt proceeding initiated by the plaintiffs in Class did the Commissioner seek to prevent the restitution by the state of benefits still owed to the plaintiffs under the extant orders of the District Court, by attempting to invoke the newly announced rule in Edelman. The District Court properly found the possibility of constitutional harm resulting from payment in Class to be equally as "remote" as it was in Lemon and the hardship resulting from a denial similarly severe. Just as the payment of state funds for all obligations owed prior to the decision in Lemon I was permitted in Lemon II, so should the payments ordered prior to the decision in Edelman be permitted to stand in Class.

Though relying exclusively on Edelman, nowhere in his brief does the Commissioner actually argue that the rule announced in that case should be applied retroactively to the instant case. Rather, he presents the novel argument that the holding of Edelman has always been the law, since 1798 when the Eleventh Amendment was ratified. (Brief of Appellant at 8). What the Court called in Lemon the "modern approach" was succinctly stated earlier in Chevron:

> We should not indulge in the fiction that the law now announced has always been the law ...
>
> Chevron, supra, 404 U.S. at 107, citing Griffin v. Illinois, 351 U.S. 12,26 (1956) (Frankfurter, J., concurring in judgment).

The fact that the rule involves a jurisdictional bar as in Chevron or even a constitutional prohibition as in Lemon does not convert a new judicial interpretation into a timeless precept.

For this Court to embrace this proposition that the Eleventh Amendment has consistently been interpreted strictly would require ignoring the historic change introduced by the decision in Ex Parte Young, 209 U.S. 123 (1908), which has significantly limited the scope of the Eleventh Amendment since its pronouncement. Moreover, to so rule would open the floodgates to state officials seeking to reopen final judgments rendered since 1798 which required payment for obligations incurred prior to the entry of prospective injunctive relief. The decision in Edelman should not be applied retroactively to reverse relief originally ordered over two years ago and now finally executed.

III. THE DECISION IN EDELMAN v. JORDAN DOES NOT BAR THE DISTRICT COURT'S AWARD OF COSTS AND ATTORNEYS' FEES INCIDENT TO AN ORDER GRANTING PROSPECTIVE INJUNCTIVE RELIEF.

It is well established that in the interests of justice, costs and attorneys' fees may be granted to counsel for the prevailing party within the broad equitable powers of a district court. Hall v. Cole, 412 U.S. 1, 4-5 (1973), Mills v. Electric Auto Lite Co., 396 U.S. 375, 391-92 (1970); Brandenburger v. Thompson, 494 F. 2d 885, 888 (9th Cir. 1974). The Commissioner contends, however, that the decision in Edelman v. Jordan, ____ U.S.____, 39 L. Ed. 662 (1974), reh. denied, 40 L. Ed. 2d 777 (1974), bars such an award against a state official. His reliance on Edelman is misplaced because the Supreme Court in construing the Eleventh Amendment held that a federal court can require payments by state officials incident to prospective injunctive relief. The matter of attorneys' fees was not at issue in Edelman but such payments clearly have only that "ancillary effect" permitted under Edelman.

This Circuit recently considered the question in light of Edelman, and concluded that an award of attorneys' fees to the prevailing party against a State official does not violate the proscription of the Eleventh Amendment. Jordan v. Fusari, 496 F. 2d 646 (2d Cir. 1974). Plaintiffs sued the State Commissioner of Labor and Administrator of the Unemployment Compensation Act, alleging that the policy of the State of Connecticut of denying unemployment compensation to women in the months before and after childbirth was unconstitutional. The suit was settled and the Court awarded attorneys' fees to

plaintiffs' counsel, one of whom was a non-profit organization, Women's Law Fund, Inc., from the fund created for the plaintiff class. The State Commissioner appealed the award of attorney's fees.

In remanding the case to the district court for a reconsideration of the theory underlying the award and of the precise amount of the award, this Court directed the district court to consider the propriety of awarding reasonable attorneys' fees against the defendant state official without deduction from the benefits to the plaintiff class. Jordan, supra, at 650-651. Aside from rejecting the appellant's Eleventh Amendment claim as to attorneys' fees on the basis of the settlement of tne merits of the lawsuit, Judge Feinberg, writing for the panel observed:

> [I]t appears to us that the allowance awarded here, as part of an order granting injunctive relief has at most the "ancillary effect on the state treasury," which Edelman v. Jordan, supra, characterizes as "a permissible and often inevitable consequence of the principle announced in Ex Parte Young," 209 U.S. 123 (1908).
>
> 496 F. 2d, at 651 (footnote omitted).

The Ninth Circuit has also recently held that "an award of attorneys' fees assessed against a state official acting in his or her official capacity is not prescribed by the Eleventh Amendment. Brandenburger, supra, at 888.

In 1971 plaintiff sued the Hawaii Welfare Director to enjoin his enforcement of a newly-adopted one-year durational residency requirement for eligibility for State Welfare benefits which was substantially identical to the requirement invalidated two years earlier in Shapiro v. Thompson, 394 U.S. 618 (1969).

Before trial, the director abandoned his position and stipulated to judgment. The plaintiff then moved for attorneys'

fees. The district court denied the motion because it found no bad faith, because plaintiff's counsel was a non-profit organization and because, according to concurring Circuit Judge Koelsch, it considered itself without power to make such an award, presumably due to the Eleventh Amendment. The Court of Appeals rejected each of the bases for the denial.

The First Circuit reached the same result in a decision handed down after Edelman. Hoitt v. Vitek, 495 F. 2d 219 (1st Cir. 1974). The Court of Appeals upheld the district court's award of attorneys' fees against the state prison official. Although the Court did not mention the Eleventh Amendment argument, it stressed that the district court "was well within the bounds of its discretion" in making the award. 495 F. 2d, at 220.

Relying on the decision in Hoitt and the First Circuit's earlier affirmation of an attorneys' fees award in Natural Resources Defense Council Inc. v. E. P. A., 484 F. 2d 1331 (1st Cir. 1973), Chief Judge Pettine recently awarded costs and attorneys' fees to plaintiffs' counsel against defendant state officials. Souza v. Travisono, Civ. Action No. 5261 (D.R.I. July 8, 1974) (a copy of which is attached hereto as Supplement "C"). The suit was brought on behalf of prisoners claiming denials of their constitutional right to access to counsel and the right to the confidentiality in attorney-client communications by attorneys from a government-funded program designed to provide legal services to indigent prisoners. In rejecting the contention of the state officials

that an award of costs and attorneys' fees against them was barred by the Eleventh Amendment, Judge Pettine refused to extend the holding of Edelman, supra, to bar the equitable award of attorneys' fees. Souza, Slip Opinion, at 7, n.3. See also, the awards of costs and attorneys' fees by Judge Pettine in Giguere v. Affleck, 370 F. Supp. 154 (D.R.I. 1974) (unreported judgment of March 27, 1974, at 3-4) (food stamp benefits), and Roselli v. Affleck, No. 5359 (D.R.I., May 8, 1974) (welfare benefits).

Many other courts have awarded attorneys' fees against state agencies or officials. Ojeda v. Hackney, 452 F.2d 947 (5th Cir. 1972) (welfare benefits); Taylor v. Perini, 359 F.Supp. 1185 (N.D. Ohio 1973) (prisoners' rights); La Raza Unida v. Volpe, 57 F.R.D. 94, 101-102 n. 11 (N.D. Cal. 1972) (environmental protection); N.A.A.C.P. v. Allen, 340 F. Supp. 703, 708, 710 n. 10 (M.D.Ala. 1972) (desegregation). Such payments have been ordered even though the state officials argued that the awards were barred by the Eleventh Amendment. See, e.g., Sims v. Amos, 340 F. Supp. 691, 694 n. 8 (M.D. Ala. 1972), aff'd mem. sub nom.,Amos v. Sims, 409 U.S. 942 (1972); and Gates v. Collier, 489 F. 2d 298 (5th Cir. 1973.) Contra, Jordan v. Gilligan , No. 73-1973 (6th Cir. 1974). The Supreme Court has also held that the federal judiciary has the power to tax costs against a state. Fairmont Creamery Co.v. Minnesota, 275 U.S. 70 (1972); See also, Utah v. United States, 304 F. 2d 23 (10th Cir. 1962). cert. denied, 371 U.S. 826 (1962), cited with approval by this Court in Jordan v. Fusari, 496 F. 2d 646, 651, n. 11 (2d. Cir. 1974).

See also, Wright and Miller, Federal Practice and Procedure: Civil Sec. 2665, at 124 (1973 ed.), and cases cited therein.

With the possible exception of the provision that the benefits owed recipients for the period between the filing of the lawsuit and the date of the orders be paid (See Section II, supra), all portions of the Ruling of March 22nd constituted prospective injunctive relief. The Commissioner was ordered to issue regulations, rescind directives and submit reports. (R. 18, Ruling, paras. (3)(a),(b), and (c). The payment of costs and attorneys' fees ordered in the Ruling was thus incident to the entry of prospective injunctive relief at that time and therefore, like the payments in Brandenberger, Hoitt, Souza, and all other cases cited at pp. 35 to 36, supra, permissible under Edelman.

In distinction to the other attorneys' fees cases, however, the award in Class was not ordered attendant to the end of the initial stage of litigation. Rather, this case concerns the narrower issue of the propriety of such an award for the prosecution of a motion for contempt necessitated by the unjustified failure of a state official to implement extant orders of a district court from which he never appealed. Such an award has only the ancillary effect upon the Commissioner permitted under Edelman.

One appellate court has so ruled with respect to compensatory damages in a case whose facts are dramatically similar to those in the instant case. In Rodriguez v. Swank, 318 F.Supp.289 (N.D. Ill. 1970), aff'd. mem., 403 U.S. 901 (1971), the Supreme Court summarily affirmed the judgment of the three-judge district court of 1970 ordering the Illinois Department of Public Aid to process all AFDC applications within 30 days from the time they were filed. A supplemental order was entered in February, 1972, to enforce compliance with the earlier order. Because non-compliance persisted, plaintiffs moved October, 1972, for further remedies including $100 in compensatory damages to any AFDC recipient whose application, through no fault of the recipient, was not processed within 30 days. The district court granted the relief sought.

On appeal the Seventh Circuit affirmed the compliance ruling after full consideration of the import of Edelman, supra. Rodriguez v. Swank, 496 F. 2d 1110 (7th Cir. 1974). The Court noted that the holding in Edelman permitted payments incident to compliance with prospective injunctive orders of a federal court. 496 F. 2d at 1112. The Court reasoned that the power to issue prospective injunctive relief requiring adherence to federal regulations "would be meaningless if the injunction were unenforceable." 496 F.2d, at 1112-1113.

Thus, as in Class,

> [t]he fiscal consequence to the state treasury was the necessary result of attempts to gain compliance with a decree which by its term was prospective in nature. "Such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in Ex parte Young, supra." [39 L.Ed.2d, at 675].
>
> Rodriguez, supra, 496 F.2d, at 1113.

Appellees submit, therefore, that the District Court had jurisdiction to order the payment of attorneys' fees against the Commissioner and urge the Court to affirm that award.

IV. THE COURT PROPERLY EXERCISED ITS INHERENT EQUITABLE POWER IN AWARDING COSTS AND ATTORNEYS' FEES INCURRED IN PROCEEDINGS NECESSITATED BY THE COMMISSIONER'S REFUSAL TO IMPLEMENT THE OUTSTANDING ORDERS OF THE DISTRICT COURT.

It is now beyond dispute that federal courts have equitable powers to award attorneys' fees in appropriate cases. Sprague v. Ticonic National Bank, 307 U.S. 161, 166 (1939). The case of Stolberg v. Members of Bd. of Trustees for State College of Connecticut, 474. F. 2d 485 (2d Cir. 1973), involved a civil rights action by an assistant professor against the former president of the State College and members of its board of trustees. The district court found that Stolberg had been discharged in retaliation for exercise of his First Amendment rights and directed the trustees to offer reinstatement with tenure and no loss of seniority but denied the request for damages and attorneys' fees. On appeal this Court reversed the finding as to attorneys' fees, stating:

> Although the award of attorneys' fees is restricted to the exceptional case..., The standard is whether bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinancy...
>
> Stolberg, supra, at 490. (citations omitted).

When tested by that standard the award of attorneys' fees and costs against the Commissioner in both his official and individual capacities by the District Court in the instant case was clearly correct. During the course of the hearing held on plaintiffs Motion for Contempt and Other Relief the Commissioner admitted being in non-compliance with the court's

prior orders. This admission was necessitated by his own bi-monthly statistical reports which revealed that an annual average of 18.1% of all AFDC applications filed were not processed within 30 days. Significantly, when the Commissioner stopped submitting the reports, the degree of non-compliance increased steadily. The director of intake at one of the Commissioner's sub-district offices testified that by December, 1973, the degree of non-compliance in his office had reached 37% and that his office was not "the worst".

The reason for this widespread, very substantial, and increasing degree of non-compliance according to the Commissioner's employees was insufficent personnel, and the District Court so found. In responding to this proffered defense the District Court stated:

> In the order of June 16, 1972, however, it was stated, "Lax Administration provides no justification for this delay in determining eligibility". The point is no less true now: non-compliance with the Court's orders will not be excused because the Welfare Department has failed to assign sufficient personnel to the task.
>
> Ruling on Plaintiffs Motion for Contempt and Other Relief (R. 18, Ruling, at 4).

Indeed, the Commissioner's course of conduct with respect to this one portion of the District Court's prospective orders was not only "unreasonable and obdurate", but directly defiant. His persistent failure in the face of a permanent injunction to hire sufficient personnel to process all AFDC applications within 30 days was wilfull and continuous, and merits a finding of bad faith. This is all the more true in light of his admission at

the hearing that emergency general assistance payments to AFDC applicants were "lower", and the testimony of a experienced town welfare director that the level of such town assistance is "substantially less" than the level of benefits under the AFDC flat grant.

The power of the Court to award attorneys' fees for expenses incurred in enforcing a valid judgment has long been established. In Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 428 (1923), the Court expressly recognized the power of a trial court to award "compensation for the expenses incurred by the successful party to the decree in defending its rights..."

The Commissioner contends that he should not have been found individually liable for the award of costs and attorneys' fees because he neither abused his discretionary authority nor acted beyond the scope of his authority. Brief of Appellant, at 19. But the record belies this contention. The promulgation of an unpublished directive on May 4, 1973, which required recipients to demonstrate actual "unmet need" in order to receive the benefits to which they are entitled and which established an arbitrary limit on the amount of benefits which would be paid to the recipient (R. 15(0), Appendix to Motion (Directive)), expressly contravened the orders of the District Court which mandated that an individual found eligible be awarded benefits from the date of application "only to the extent that emergency town welfare benefits received by these recipients were less than the AFDC payments. (R.11, Judgment, at 2).

In analyzing the effect of the directive the District Court reasoned that misunderstanding by departmental employees was "exacerbated" by the promulgation of the directive (R. 18, Ruling, at 6), and concluded that "plaintiffs' argument that imposition of a fixed dollar amount limiting retroactive payments constitutes a disincentive to the Department to process eligibility applications speedily is well taken." (R. 18, Ruling, at 9). The District Court thereby ordered the Commissioner to rescind the directives and to promulgate a clear statement of policy in consonance with its orders as to payments from the date of application. (R. 18, Ruling, at 9, 12-13 para. (3)(c)). Having the knowledge that his unpublished directive would be fully implemented by departmental employees, the Commissioner acted at his own peril in failing to seek prior approval of the directive from the District Court, and in willful disregard of its clear orders.

Finally, at the hearing, the disclosure was first made that none of the benefits owing to eligible recipients for the period from December, 1971, to June, 1972, had ever been paid. The record evidence demonstrates that the relevant records, necessary in order to identify those eligible for payment at this late date, had been destroyed. (R. 2, Transcript, at 8, l. 20 through 9, l. 1; Tr., at 42, l. 19 through 43, l. 20). Destruction of departmental files subject to the reach of the District Court orders which he never appealed vitiates the Commissioner's de-

fense "that this aspect of the order was originally overlooked by the welfare department, and when its enforcement was never sought, appears to have been forgotten." Brief of Appellant, Statement of the Case, at 3.

In Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974), Circuit Judge Koelsch, specially concurring, found that the defendant state official's refusal to follow the Supreme Court's decision in Shapiro, supra, constituted bad faith. "[T]he real inquiry . . . should be upon the defendant's conduct which precipitated this litigation . . ." Brandenburger, supra, at 891 (Koelsch, C.J., specially concurring). In the instant case the Commissioner's conduct which necessitated the contempt proceeding ranged from his defiant refusal to hire sufficient personnel to comply with the District Court's orders, to the promulgation of an unpublished directive contravening the orders respecting the full payment of benefits from the date of application, and finally to the destruction of records necessary to the prompt, but belated, effectuation of full relief to the plaintiff class. The District Court's award of costs and attorneys' fees against the Commissioner in both his individual and official capacities was clearly correct as an exercise of its equitable powers to ensure full compliance with its valid prior orders in the face of "unreasonable, obdurate obstinacy." Stolberg, supra, at 490.

The District Court's award of costs and attorneys' fees in the exercise of its equitable powers is also justified under the "private attorney general" doctrine. Under that doctrine, an

award of attorneys' fees should be made to a litigant who (1) furthers the interests of a significant class of persons by (2) effectuating a strong congressional policy. "The award serves the purpose of encouraging such public minded suits. See Sims v. Amos, supra, at 694-695; La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972)." Brandenburger, supra, at 888 (other citations omitted). Under this doctrine the question of the good or bad faith by the defendant is irrelevant. Sims, supra, at 694-695; Brandenburger, supra, at 888.

In Brandenburger, the Ninth Circuit awarded attorneys' fees to plaintiff's counsel, the ACLU. Like the plaintiff therein whose challenge to Hawaii's newly enacted durational residency requirement benefitted a significant class of potential welfare recipients by vindicating their federally protected right of interstate travel, the plaintiffs in the instant case have conferred a substantial benefit upon a significant class of persons composed of potential AFDC recipients by vindicating their federally protected right to a prompt determination of eligibility and their Constitutional rights under the Fourteenth Amendment to the payment in full of AFDC benefits from the date of application.

The plaintiffs in the instant case are likewise similarly situated to their counterparts in Hoitt, supra, and Souza, supra, whose litigation resulted in constitutional redress for violations of their civil rights as prisoners, and justified an award of attorneys' fees against state officials under the private attorney general doctrine. Hoitt, supra, at 221; Souza, supra;

Slip Opinion, at 6-7; see also, Natural Resources Defense Council, Inc. v. E.P.A., 484 F.2d 1331, 1333 (1st Cir. 1973); Stanford Daily v. Zurcher, 366 F.Supp. 18, 25 (N.D. Cal. 1973).

Although not raised by the Commissioner, appellees submit that the District Court properly ordered a modest award of costs and attorneys fees to the two legal services programs which employ plaintiffs' counsel. In Jordan v. Fusari, supra, this Court thought Commissioner Fusari's contention unpersuasive that an award of attorneys fees was not warranted because one of the law firms representing plaintiffs' class therein was a non-profit organization, Women's Law Fund, Inc. 496 F.2d, at 649. In Souza, supra, the court awarded attorneys' fees to three private attorneys employed by a federally-funded program to provide legal services to prisoners. In so ruling, Chief Judge Pettine remarked:

> [t]hrough experience this Court has learned that often the actions of private attorneys willing to devote their time and highly refined skills is absolutely essential for the protection of the constitutional rights of prisoners. The private bar should be encouraged to undertake such difficult and time-consuming litigation

Souza, supra, Slip Opinion, at 7.

In Hoitt, the First Circuit while approving the denial by the district court of attorneys' fees to New Hampshire Legal Assistance because an award of fees was made to private attorneys in the case, the court reasoned that but for the existence of the private attorney no legitimate policy would be served in denying attorneys' fees to the legal services program. 495 F.2d, at 221; Brandenburger, supra, at 889. See generally, Note,

Awards of Attorneys' Fees to Legal Aid Offices, 87 Harv. L. Rev. 411 (1973).

For the above reasons appellees submit that the District Court's award of costs and attorneys' fees to plaintiffs' counsel entered as it was in connection with a contempt proceeding to vindicate the plaintiffs' rights and the authority of the court should be affirmed. As this Court has recently stated, the District Court is the forum most familiar with the particular equities in a particular case, and thus attorneys' fees are a matter left to the reasonable discretion of the trial judge. Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, Nos. 73-2595, 74-1014 (2d Cir. June 3, 1974) (per Waterman, Friendly and Mulligan), Slip Opinion, at 3929.

CONCLUSION

For all the foregoing reasons, the appeal from the provisions of the District Court's Ruling that required the Commissioner to comply with its previous orders should be dismissed, and the award of costs and attorneys' fees should be affirmed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Supplement "A"

ELENA CLASS, et al.	*	
v.	*	Civ. No. 14,764
NICHOLAS NORTON, Successor to Henry C. White, individually and as Commissioner of the State Welfare Department, et al.	*	

MOTION FOR CONTEMPT
AND OTHER RELIEF

Now come the plaintiffs by their attorneys, Marilyn Kaplan Katz and James Sturdevant and respectfully move that the defendant, Nicholas Norton, Commissioner of Welfare for the State of Connecticut, be adjudged in contempt of this Court, and in support of thereof plaintiffs respectfully state:

1. Final Orders were entered by this Court on June 16, June 22 and June 29, 1972 in the above entitled action (copies of these orders are included as Exhibits "A," "B," and "C" of the Appendix), ordering the defendant, inter alia, to determine eligibility for welfare assistance under the State program of Aid to Families with Dependant Children (hereafter "AFDC") within thirty days from the date of application, to make assistance effective from a date no later than the date of application for all recipients, and to submit bi-monthly reports with respect to these Orders to the Court.

2. Said Orders have been in full force and effect since their

respective entries.

3. Defendant Norton has failed and refused to comply with the provisions of this Court's Orders in the following respects:

a. Defendant has filed and refused to mail assistance checks or written notifications of denial of assistance to all AFDC applicants within the required thirty day period as ordered by paragraph 3, page 4, of the Order of this Court dated June 16, 1972 (Exhibit "A") and paragraph 2 of the Order dated June 29, 1972 (Exhibit "C"). This noncompliance has been substantial and widespread, as evidenced by the defendant's own statistical reports (copies of which are included as Exhibits "D" through "I" of the Appendix) and by the affidavits on behalf of plaintiffs (included as Exhibits "J" through "N" of the Appendix).

b. Defendant has failed and refused to pay the full amount of benefits from the date of application to all recipients, to the extent that the amount exceeds the amount of any emergency town welfare benefits received by a recipient, as ordered by paragraph 2 of the Order, dated June 22, 1972 (Exhibit "B"), and paragraph 4 of the Order, dated June 29, 1972 (Exhibit "C"). This noncompliance has been substantial and widespread as evidenced by the affidavits on behalf of plaintiffs (included as Exhibits "K" through "N" of the Appendix), and willful, as evidenced by the defendant's promulgation of a directive in direct contravention of the Orders of this Court under which he refuses to pay recipients assistance from the date of application absent proof of "unmet need." With respect to recipients who received town assistance during the pendency of their AFDC applications, the defendant refuses to pay

absent "verification of unmet need" if the amount of assistance due the recipient exceeds $250.00 (a copy of defendant's directive, dated May 4, 1973, is included as Exhibit "O" of the Appendix).

c. Defendant has failed and refused to submit adequate and accurate reports detailing the processing of AFDC applications as ordered by paragraph 1 of the Order, dated June 22, 1972 (Exhibit "B"),and paragraph 5 of the Order, dated June 29, 1972 (Exhibit "C").

WHEREFORE, plaintiffs pray:

1. That the defendant be adjudged in contempt of Court for having violated and disregarded the previous Orders of this Court.

2. That the defendant be ordered to purge himself of contempt by immediately complying with the previous Orders of this Court, including, but not limited to, determining eligibility for all applicants within the required thirty day period, paying the full amount of benefits from the date of application to all recipients, and submitting adequate and accurate reports of the processing of AFDC applications (paragraphs 2 through 6 of the Plaintiffs' Proposed Order offer specific suggestions for implementation of this relief).

3. That the penalty for noncompliance provided for in the previous Order of the Court, the withdrawal of federal funds for the AFDC program in Connecticut, be imposed upon the defendant (paragraph 7 of Plaintiffs' Proposed Order offers specific suggestions for implementation of this relief).

4. That the defendant be required to pay reasonable costs and attorney's fees incurred in the prosecution of this contempt.

5. That this Court grant such other and further relief as it may deem appropriate.

Respectfully submitted,

Marilyn Kaplan Katz
Fairfield County Legal Services
412 East Main Street
Bridgeport, Connecticut 06511
366-4955

James Sturdevant
Tolland-Windham Legal
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872-0553

Attorneys for Plaintiffs

STATE OF CONNECTICUT

STATE WELFARE DEPARTMENT

110 BARTHOLOMEW AVENUE HARTFORD, CONNECTICUT 06115

OFFICE OF
THE COMMISSIONER

July 17, 1974

Honorable M. Joseph Blumenfeld
United States District Court
450 Main Street
Hartford, Connecticut

Dear Judge Blumenfeld:

In continuing compliance with the Court Order, entered on March 22, 1974, to review all active and inactive AFDC cases granted between December 1, 1971 and June 1, 1972, the following is respectfully submitted.

As of this date, we have reviewed all the cases in question with the exception of approximately 125 AFDC cases assisted by the City of Bridgeport, for which we are now in the process of obtaining the necessary information to establish eligibility for supplemental payments.

The total number of cases reviewed was 4,746.

With regards to active cases, the total number of cases reviewed was 2,757, of which 787 were found eligible for retroactive payments.

With regards to inactive cases, the total number of cases reviewed was 1,989, of which 413 were found eligible for retroactive payments.

Supplemental checks have been mailed out on all of the above cases.

A report on the Bridgeport cases will be submitted as soon as those cases are processed.

Sincerely,

Nicholas Norton

Nicholas Norton
Commissioner

NN/adn

cc: Attorney Katz
Attorney Sturdevant
Attorney Walsh

SUPPLEMENT "B"

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

ANTHONY SOUZA, et al

v.

ANTHONY TRAVISONO, et al

Civil Action No. 5261

O P I N I O N

PETTINE, Chief Judge.

This is a civil action filed on behalf of the inmates confined at the Adult Correctional Institutions (hereinafter "ACI") against various state officials and correctional officers seeking declaratory and injunctive relief. Specifically, the plaintiffs allege that they had been denied the right of access to counsel and the right to attorney-client confidential communication in violation of First, Sixth, Eighth and Fourteenth

Amendments to the U.S. Constitution. The cause of action arose under 42 U.S.C. sec. 1983 and 28 U.S.C. sec. 2201 and 2202. Jurisdiction is based upon 28 U.S.C. sec. 1343. Counsel for the plaintiffs row petition the Court for costs and attorneys fees.

TRAVEL OF THE CASE

In November 1971, an Inmate Legal Assistance Program (hereinafter "ILAP") was instituted at the Adult Correctional Institutions under the auspices of the Rhode Island Governor's Committee on Crime, Delinquency and Criminal Administration and was administered pursuant to a sub-contract by the Center for Corrections and the Law at Boston College Law School. The program was federally funded and is designed to provide a full panoply of legal services to indigent prisoners. At the time the suit was commended "ILAP" was staffed by a supervising attorney, a staff attorney, an office manager, and a group of law students from the Boston College Law School who work on a part-time basis assisting the two staff attorneys. On April 2, 1973 a riot occurred at the prison and shortly thereafter, on

June 22, 1973, a guard was murdered. In the interim a new warden was appointed and as a result of his policies, the "ILAP" was evicted from its institutional office space, law students were barred from the prison, and the access of attorneys to the prison was curtailed.

On July 27, 1973, this Court issued a preliminary injunction with the consent of all parties after a hearing at which evidence was presented. In substance, the Order granted any attorney the right to consult with an inmate at the "ACI" once he designated the general purpose of his visit. The Order further provided that consultation could reasonably be had between the hours of 8:30 a.m. and 3:30 p.m. with consultations permitted at other times for reasonable cause. Regarding agents and/or experts of attorneys the warden was ordered to make individualized determinations whether they were to be admitted until the Court decided the broader issue of law student access to the prison. The Court also ordered the room being constructed for attorney consultations be completed within two weeks. In the July 27, 1973 decision, this Court expressly reserved decision on the following issues:

(a) whether or not agents or experts in the service of attorneys enjoy the same privilege as attorneys;

(b) whether or not the consultation facilities afford appropriate confidentiality;

(c) whether the room to be provided to attorneys would be adequate for appropriate consultation by the attorney and client;

(d) whether or not the "ILAP" is entitled to the use of an office in the administration section of the maximum security building.

On December 18, 1973 [1] this Court in its decision on the reserved issues held that an inmate has a constitutional right to reasonable access to the courts and that for that right to have any meaning inmates must also have the right to access to "qualitatively competent legal assistance, reasonably available and capable of responding to the needs of the prison population." In the instant action the Court found that the use of law students by the "ILAP" was essential for the satisfaction of those rights and held that the state could not condition operation of the program so as to effectively impair these constitutional rights by summarily barring law students from the prison. Additionally, the Court held, "In circumstances in which a prisoner's Sixth Amendment right to counsel

is involved, not only must an attorney be given the broadest possible opportunity to meet and confer with his inmate client but the same right as of necessity filters down to his paralegal assistance." 368 F. Supp. at 970. In the second portion of the decision this Court held that the state may not limit attorney access to attorneys of record and directed the state to permit attorneys access to inmates, "in any and all situations serving a legitimate legal or legally related issue which may either directly or indirectly involve that inmate". 368 F. Supp. at 971. Finally, this Court held that the consultation facility for attorneys to meet with their inmates were "of such limited capacity as to infringe on the inmate's right to counsel and court access," Id. at 972, and ordered the necessary remedial action.

On appeal the First Circuit affirmed to the extent that the district court opinion is governed by Procunier v. Martinez, _____ U.S. _____, 42 U.S.L.W. 4606 (April 29, 1974).

COSTS AND ATTORNEYS FEES

Federal courts have equitable powers to award attorneys fees in appropriate cases. Sprague v. Ticonic National Bank, 307 U.S. 161, 166, 59 S. Ct. 777, 83 L.Ed. 1184 (1939). In

the absence of statutory or contractual authorization, the court in its exercise of equitable powers may award attorneys fees and costs when the interest of justice so requires. Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed. 2d. 702 (1973); Mills v. Electric Auto-Lite, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed. 2d. 593 (1970). Therefore, this Court must decide whether this is an appropriate case for the award of costs and attorneys fees, I conclude that it is.

While the general American rule is that attorneys fees are not ordinarily recoverable as costs, several judicially developed exceptions to this rule have developed. Natural Resources Defense Council, Inc. v. E.P.A., 484 F. 2d. 331 (1st. Cir. 1973). The First Circuit has recently reiterated its position that in cases where a significant public interest has been forwarded by the suit, the Court may award attorneys fees. Hoitt v. Vitek, 495 F. 2d. 219 (1st Cir. 1974). Earlier, in Natural Resources Defense Council, Inc. v. E.P.A., supra, the court stated:

> "Recently the notion of spreading the litigation costs equitably among all the beneficiaries has been coupled with that of encouraging suits which promote the public interest. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d. 1263 (1963); Lee v. Southern Home Sites Corp., 444 F. 2d. 143 (5th Cir. 1971); LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972); Sims v. Amos, 340 F. Supp. 691 M.D. Ala. 1972). When private litigation vindicates a significant

> public policy and at the same time, creates a wide-spread benefit policy today favors awarding attorneys fees against a party who exists to serve or represent the interest of all those benefitted." 484 F. 2d. at 1333. 2/

The present case falls clearly within the scope of this exception. The benefit accruing to the plaintiff class from this action cannot be overemphasized. Fundamental rights going to the heart of the integrity of the American system of justice have been vindicated. There can be no question that congressional policies strongly favor the vindication of federal constitutional rights violated under the color of state law, 42 U.S.C. sec. 1983. Moreover, through experience this Court has learned that often the action of private attorneys willing to devote their time and highly refined skills is absolutely essential for the protection of the constitutional rights of prisoners. The private bar should be encouraged to undertake such difficult and time-consuming litigation. Therefore, an award of attorneys fees to the three private attorneys who represented the plaintiffs in this action is appropriate. 3/

Left to be determined is the reasonableness of the amount requested by counsel. The fixed costs incurred by Mr. Gonnella and Mr. Stein are undisputed and unchallenged and are therefore granted. As attorneys fees each attorney seeks to be compensated at the rate of $60 per hour and has submitted the affidavit of Mr. Milton Stanzler, a well-known local attorney of recognized stature who is thoroughly familiar with the complexities of civil rights litigation who states that he believes the requested hourly rate is reasonable for litigation of this nature. 4/ Accordingly, Attorney Gonnella has submitted an affidavit stating that he expended 189 hours on this case and seeks $11,340 in attorneys fees. Attorney Stein has submitted an affidavit stating that he spent 29.6 hours on this action and seeks $1,776 in attorneys fees. Finally, Attorney Angelone in his affidavits states that he expended 34 hours on this matter and seeks $2,040 in attorneys fees. The defendant has submitted no affidavits in opposition to the plaintiff's figures but simply argues in his memorandum that a more experienced attorney could have done the work in this case in appreciably less time and that the hourly rate cited is too high for such "young men only recently graduated from law school."

The specific amount of attorneys fees to be granted is within the Court's discretion. Hoitt v. Vitek, supra, 6 Moore's Federal Practice, sec. 54.77 [2], p. 1716. In determining the amount the Court may take into account the circumstances surrounding the case, its importance and complexity, and the skill, experience and professional standards of the attorney.

There is no factual basis in the record that these attorneys are "young men only recently from law school". Their work in this case belies this fact. Their court performance and briefs were of high caliber not to be demeaned because of their age. I found them skilled, well prepared and obviously experienced in prison litigation. The quality and comprehensiveness of their work was of unquestioned assistance to this Court.

The State has not seen fit to question the hours expended by counsel and I, therefore, accept the same as reasonable for this type of litigation. I also accept the undisputed affidavit of Mr. Stanzler and accordingly the fees as requested are hereby granted.

An Order will be prepared accordingly.

BY ORDER

Asst. Dist. Clerk

ENTER:

CHIEF JUDGE

July 5, 1934.

F O O T N O T E S

1/ 368 F. Supp. 959.

2/ Indeed, in Sims v. Amos, supra at p. 694, the proposition was stated even more strongly:

> "In instituting the case sub judice, plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent. (Citations omitted) If, pursuant to this action plaintiffs have benefitted their class and have effectuated a strong congressional policy, they are entitled to attorneys fees regardless of defendant's good or bad faith. (Citation omitted) Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits ..., and to carry out congressional policy. (Citation omitted) " at p. 694.

3/ The defendant contends that under the Eleventh Amendment to the U.S. Constitution this Court lacks jurisdiction to award attorneys fees. However, the defendant cites no cases in support of its position. The First Circuit in Hoitt v. Vitek, supra, recently granted attorneys fees in another 42 U.S.C. sec. 1983 action against the warden of a state prison and in Natural Resources Defense Council, Inc. v. E.P.A. the First Circuit took note of the solvent immunity problem and stated:

> "[C]ourts have often awarded fees against state agencies or officials.

Ojeda v. Hackney, 452 F. 2d. 947 (5th Cir. 1972); Taylor v. Perini, 359 F. Supp. 1185 (N.D. Ohio 1973) (civil rights); La Raza Unida v. Volpe, 57 F.R.D. 94, 101 - 102 n. 11 (N.D. Cal. 1972) (environmental protection); Sims v. Amos, 340 F. Supp. 691, 694 n. 8 (M.D. Ala. 1972) (reapportionment); NAACP v. Allen, 340 F. Supp. 703, 708, 710 n.10 (M.D. Ala. 1972) (desegregation)." at pp. 1333 - 1334.

While one could argue that the Supreme Court's recent Eleventh Amendment decision in Edelman v. Jordan, 42 U.S.L.W. 4419 (March 25, 1974) concerning a court order directing the state to pay welfare benefits retroactively greatly expands the strength of the Eleventh Amendment, I do not conclude that this decision affects the power of the court to award attorneys fees. Initially, I note that the First Circuit in Hoitt v. Vitek, supra; issued after the decision in Edelman, felt unencumbered by the Eleventh Amendment in approving the grant of attorneys fees in a not dissimilar situation. Second, I find the reasoning adopted first in Sims v. Amos, supra, persuasive. The Court wrote:

> "Individuals who, as officers of a state are clothed with some duty with regard to a law of the state which contravenes the constitution of the U.S., may be restrained by injunction and in such a case the state has no power to impart to its officers any immunity from such injunctions or from its consequences including the court costs incident thereto." n.8

Therefore, the Court did not find solvent immunity a bar to the award of attorneys fees. Taylor v. Perini, supra, La Raza Unida v. Volpe, supra, Natural Resources Defense Council, Inc. v. E.P.A., supra.

4/ The counsel for the plaintiff submitted the affidavit of another prominent attorney who suggested hourly rate was $75.

CERTIFICATION

Please take notice that I have this 26th day of August, 1974, filed the original of the Appellees' Brief with the United States Circuit Court of Appeals for the Second Circuit by depositing the same in the United States mails, postage prepaid. I hereby certify that on this same date I mailed a copy of said Brief in the United States Mails, postage prepaid to Edmund C. Walsh, Esquire, Assistant Attorney General, 90 Brainard Road, Hartford, Connecticut 06114.

James C. Sturdevant
Attorney for Plaintiffs-Appellees